

June 11. 1756.

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ANSWERS

F O R

*John Cameron, only lawful Son to Alexander Cameron
of Kinnaird,*

T O

The Bill of Advocation offered in name of *James
Malcolm, second Daughter to the deceased James
Malcolm Merchant in Jamaica.*

THE Bill of Advocation which is now to be answered, complains of an Interlocutor of the Commissaries of *Edinburgh*, of Date the 16th March 1756; whereby, upon advising the mutual Proofs in the conjoined Processes of Declarator of Marriage and Freedom, which had been intended and pursued before them at the Instance of the above-named Parties, they have found and declared them to be Husband and Wife.

By this Sentence the Respondent stands acquitted of those Slanders and Calumnies with which he had been so unjustly loaded, and which, for some little Time, had gained but too much Credit amongst those who were Strangers to the Case, and to the Characters of the Parties: And as Truth and Evidence will ever be the Measure of your Lordships Judgment, the Respondent rests secure, that, in the Review of this Case, your Lordships will have no manner of Difficulty in affirming this Sentence of the Commissaries.

Alongst with these Answers, there will be presented to your Lordships a printed Copy of the Proof, as also the printed Information

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formation which was exhibited to the Commissaries on the Part of the Respondent, and to which he will beg Liberty to refer, in so far as these Answers may be deficient upon any of the Points which will be the Subject of your Lordships Consideration.

And, in the *first* place, In order to remove any undue Impressions which Falsehood and Calumny may have occasioned, the Respondent proposes to lay before your Lordships a genuine Account of this whole Affair, from first to last. *2dly*, To state Facts truly and fairly, without the least Disguise, and in the Order of Time in which they occurred; and in stating these, he will apply the Evidence, as it stands in Proof, to the several Particulars. *3dly*, He will examine the Sufficiency and Credibility of the opposite Proof attempted by the Complainer. And, in the *last* place, He will consider the Relevancy of the several Defences which have been pleaded for the Complainer, and which are again resumed in this Bill of Advocation.

And as, in the Entry, it must occur to your Lordships, that if the Respondent is truly guilty of the several Particulars with which he is charged, he merits the highest Punishment that the Law can inflict; so, on the other hand, it must be admitted, that if these are so many gross Calumnies hatched and contrived without the least Foundation in Truth, as in the Sequel he hopes to make appear, the Complainer, or those who act for her, cannot escape the just Censure of the Law.

The Respondent must at the same time do that Justice to the young Lady whom he now claims to be his lawful Wife, as fairly to acquit her of this Injury. He knows her to be under the Authority of her Mother, a Lady of such strong Passions as does but too well account for the Influence she has had upon her Daughter, to be thus made a Tool of in so delicate an Affair, as to disclaim her Husband, in order to gratify a most groundless Resentment conceived by her Mother upon the slightest and most trivial Occasion. And this Consideration, joined with the Complainer's tender Years, gives reasonable Ground to hope, that when the Complainer shall be freed from this Thral-

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dom, and the Marriage established by Judgment of your Lordships, affirming the Sentence of the Commissaries, the Complainer may yet return to a Sense of her Duty, and this Marriage prove as comfortable a Settlement to both Parties, as if nothing of this kind had ever intervened.

The Estate of *Kinnaird*, which belongs in Property to the Respondent's Father, is of yearly Rent about 5000 Merks. The Respondent being his Father's only Child, is the presumptive Heir in that Estate; and having applied himself to the Study of Physic, was intending to go abroad to finish his Education when this Marriage came in hands.

A Part of the Lands of *Lathrisk*, situated in the Neighbourhood of the Estate of *Kinnaird*, was purchased by the Complainer's Mother: And the Succession to this small Estate, which does not exceed *L. 100 Sterling* of yearly Rent, burdened with a Liferent-annuity of *L. 50 Sterling* to the Mother of this Complainer, devolves upon her and her Sister, as Heirs-portioners to their Father. What Pretensions this can afford the Complainer to the Character of a *Fortune*, or what Temptation it should have proved to the Respondent, young and unexperienced as he was, to have attempted a forcible Marriage, is humbly submitted.

The Complainer's elder Sister is, to the Observation of every Mortal that has ever seen her, in such a State and Condition, in point of Judgment and Understanding, as to be but a few Degrees removed from an Idiot: And therefore, as this *provident* Lady their Mother could have no reasonable Prospect of settling her eldest Daughter in Marriage, she seems to have resolved to secure a suitable Match for the Complainer, her younger Daughter, how soon she should be past the Age of Pupillarity. And though this may appear to have been rather premature for a young Lady of such tender Years, it is in some measure accounted for from her uncommon Maturity and Briskness, as will be evident to your Lordships from the Particulars of the Proof hereafter to be stated.

And as, in this View, it seems to have occurred to the Complainer's

plainer's Mother, that the Respondent would, upon many Accounts, be a suitable Match for this young Lady, every Art or Stratagem that the Knowledge of an experienced Matron could suggest to kindle and promote a mutual Affection between them, was put in Practice.

These Observations being premised, and which will be more fully illustrated in the Sequel, the Respondent will now proceed to state the Facts in the Order of Time in which they happened, and to class the Proof as applicable to these. And the general Points thereby proposed to be established will be these following. *1st*, That the Courtship previous to the Marriage was countenanced and encouraged by the Complainer's Mother. *2dly*, That the Marriage itself was celebrated with her Knowledge, Approbation, and Consent. And, in the *last* place, That all the Disturbance which has since occurred, did proceed from a most unreasonable Prejudice taken up by the Mother of this Complainer upon a most trivial Occasion, but which she has since followed out with implacable Malice and Revenge, chusing to sacrifice her Daughter's Happiness, rather than not to gratify her own Resentment.

ART. I.

And, in the *first* place, It is proved by a Cloud of Witnesses, which therefore will not be controverted, that, from the Beginning of *September 1754* to the Middle of *December* thereafter, there was a continued Intercourse of Visits between the two Families; that upon those Occasions they staid at one another's Houses in Family for several Days at a Time; that the Respondent was frequently pressed and importuned by the Complainer's Mother to remain over Night at the House of *Lathrisk*, when he was proposing to go home: And more particularly, that, upon the last of those Visits, immediately before the two Families set out for *Edinburgh* in Company together, as hereafter to be mentioned, the Complainer, her Mother and Sister, paid a Visit for the Space of ten Days at the House of *Kinnaird*, the Respondent's Father being all that Time in *Edinburgh*.

This is proved by Miss *Anne Cameron*, p. 6. at B; Miss *Jean Cosuan*,

Cosnan, p. 12. at D, E, F; *Mrs Cameron of Kinnaird*, p. 16. at F, G; and several others. Proof of Art. I.

This Intercourse of Visits, and the Liberty which, upon those ART. II. Occasions, was granted to the Complainer and Respondent, of being frequently by themselves, both within Doors and without, the Freedoms and Familiarities in which they were indulged, naturally kindled in their young Breasts a mutual Desire and Affection for each other. They always sat next one another at Table; they were constant Partners in their Parties at Cards, or joint Stocks. Upon other Occasions, they sat with their Hands clasped in one another; and sometimes the Complainer sat upon the Respondent's Knee, with her Arms about his Neck. And as these little *Douceurs* passed under the Eye of the whole Company, and even of the Servants of the Family, their mutual Attachment to each other did not escape Observation. What further *Douceurs* passed between them when by themselves, does not admit of Proof, but may easily be supposed. And these Facts are proved by Miss *Anne Cameron*, p. 6. at C, D; Miss *Jean Cosnan*, p. 12. at G, and p. 13, at A, B; *Mrs Cameron of Kinnaird*, p. 17. at A, B; *Robert Scot*, p. 25. at B; Miss *Jeanie Grant*, p. 33. at C. Proof of Art. II.

That the Complainer's Mother was an Eye-witness to, and ART. III. countenanced these Familiarities and *Douceurs*, the Tendency of which, it cannot be supposed she was ignorant of, is proved by Miss *Jean Cosnan*, p. 13. at B; *Mrs Cameron of Kinnaird*, p. 17. at A, B, C, D; *Robert Scot*, p. 25. at C; Miss *Jeanie Grant*, p. 33. at D. Proof of Art. III.

The Respondent made Proposals of Marriage to the young ART. IV. Lady herself; which she readily agreed to, providing her Mother was satisfied; and, by her Consent, disclosed his Mind to the old Lady herself; who, without the least Hesitation, accepted thereof, expressed the good Opinion she had conceived of the Respondent, and the high Satisfaction it would give her to have her Daughter so comfortably settled in her own Neighbourhood.

The only Objection she pretended to make, was to the immediate

mediate Consummation thereof; which, she was pleased to say, would hurt her Daughter's Growth, and might otherwise prejudice her Health, in case she should prove with Child, in respect of her tender Years; and therefore she insisted upon it as a preliminary Article. To which the Respondent consented, that as the Respondent was then proposing to go abroad, to finish his Education, the Consummation of the Marriage should be delayed till the Respondent should return from foreign Parts; but that, in the mean time, the Marriage itself should be celebrated when the two Families should meet in *Edinburgh*; and the Respondent undertook to procure his Father's Consent. The first Part of this Article, *viz.* the young Lady's own Consent, will easily be presumed from what followed; and the second Part of this Article, *viz.* the old Lady's Consent to, and Satisfaction in this proposed Marriage, is distinctly proved by the Oaths of her Sister and Brother-in-law, to whom she communicated the same before she left the Country, *Robert Thomson*, Town-clerk of *Dysart*, *p.* 22. and *Elisabeth Durward* his Spouse, *p.* 24. who concur in deposing, That the Complainer's Mother came to their House at *Dysart*, and communicated to them severally the intended Marriage between the Complainer and Respondent; which, she said, was to be kept a Secret. And upon their objecting, that the Complainer was too young, the Complainer's Mother replied, that the Respondent was to go abroad immediately after the Marriage; and that there was to be no Consummation or Cohabitation between them, till he returned: That, in order to gain their Approbation, she represented the Respondent's Father's Estate to be worth *L.* 500 a-year, besides *L.* 3000 of an independent Fortune, which the Respondent himself had: And further said, that she had wrote to Mr *Grant* of *London*, (now Sir *Alexander Grant*), one of the Complainer's Tutors, and expected Letters from him to meet her at *Edinburgh*; which would put an end to the Affair. And as these two Witnesses cannot be suspected of any undue Bias to the Respondent, their Testimonies afford irrefragable Evidence, that this Marriage was countenanced, encouraged, and consented to by the Complainer's Mother, under the above Precaution, that it should

Proof of
Art. IV.

should not be consummated till the Respondent returned from foreign Parts.

Matters being thus prepared; and as the two Families were proposing to leave the Country much about the same time, in their Way to *Edinburgh*, where the Marriage was to be celebrated, the Complainer's Mother signified a strong Desire, that they should all come up in company together, and pressed Mrs *Cameron* of *Kinnaird* to postpone the Time of her Departure for a few Days, when they would all come in company together: And upon Mrs *Cameron*'s remonstrating the Inconveniencies it would occasion to her, to put off the Day of her Journey, which was already fixed, the Complainer's Mother readily undertook so to order her own Affairs, as to be in readiness to set out upon the same Day, providing Mrs *Cameron* of *Kinnaird*, and her Family, would take a Night's Quarters at *Lathrisk*, upon the *Sunday's* Evening, when she would be in readiness to set out in Company upon the *Monday's* Morning.

These Facts are proved by the concurring Testimonies of Miss *Anne Cameron*, p. 6. at G, and p. 7. at A, B, C, D; Miss *Jean Cosnan*, p. 13. at E, F, G, and p. 14. at D; Mrs *Cameron* of *Kinnaird*, p. 18. at A, B, C, F. Proof of Art. V.

Accordingly it appears, that Mrs *Cameron* of *Kinnaird*, and the Females then in Family with her, went to *Lathrisk*, in their Way to *Edinburgh*, upon the *Sunday's* Evening: That the Respondent remained at *Kinnaird* all that Night, and did not come to *Lathrisk* till next Morning: That the Complainer's Mother showed the greatest Anxiety at the Respondent's not coming to *Lathrisk* so timeously the next Morning as she expected, and refused to set out upon her Journey to *Edinburgh*, with the other Ladies, till the Respondent should arrive; and that accordingly she, and her Daughter the Complainer, waited at *Lathrisk* till the Respondent came up, allowing the other Ladies to set out before her in their Journey to *Edinburgh*. Art. VI.

These Facts are proved by Miss *Anne Cameron*, p. 7. at D; Miss *Jean Cosnan*, p. 13. at E, F, G, and p. 14. at D; Mrs *Cameron* of *Kinnaird*, p. 18. at A, B, C, F. Proof of Art. VI.

Mils *Jean Cosnan*, p. 14. at B; Mrs *Cameron of Kinnaird*, p. 18. at F; and *Robert Scot*, p. 26. at B.

ART. VII. Upon their Arrival at *Leith*, the Servants belonging to the Complainer's Mother, were dispatched with her Baggage to her Lodgings in *Edinburgh*. They were met at *Leith* by the Respondent's Father; and it being proposed, that the whole Company should drink Tea that Afternoon at Mrs *Cosnan's* House in the *Canon-gate*, where Mr *Cameron of Kinnaird* and his Lady used to reside when in *Edinburgh*, Mrs *Cameron* being a Daughter of Mrs *Cosnan's*; this was agreed to. And accordingly the whole Company took Coach at *Leith*, and arrived at Mrs *Cosnan's*, where they passed the Evening. And as this Fact is agreed to by both Parties, it is unnecessary to state the Proof thereof. The Respondent took Occasion to communicate to his Father the Terms that had been agreed to between the Respondent and the Complainer's Mother, particularly, that the Marriage was to be kept secret, and not to be consummated till the Respondent should return from finishing his Education; and with some Difficulty prevailed with his Father to consent thereto, as he reasonably thought, that both Parties were full young to enter upon the married State. But this Difficulty being got over, in respect of the Compromise, that there was to be no Consummation or Cohabitation, till the Respondent's Return from abroad; and the Respondent having brought his Father and the Complainer's Mother to an Interview by themselves, where they congratulated each other upon the agreed Alliance, the Respondent proposed, that if a Minister could be got, the Marriage should be celebrated that same Night, in the House of Mrs *Cosnan*, where they were then all met, and where Matters might be conducted with greater Secrecy than in the Complainer's Mother's House, before it should be known that the two Families were arrived in *Edinburgh*. And though no positive Proof can be produced of what passed in these private Conversations, it is incredible to suppose, that the Respondent should have gone in quest of a Minister, for the Purpose of celebrating this Marriage, if these Preliminaries had not been agreed to.

Accordingly

Accordingly it appears, that, about Eight of the Evening of that same Day, the Respondent met with the Reverend Mr *Foulis*, who for many Years had been Minister of the *English* Chapel here in *Edinburgh*; and prevailed with him to accompany the Respondent to Mrs *Cosnan's* House, in order to marry him and the Complainer, upon Assurance, that the Respondent's Father and the Complainer's Mother were to be present; and that it was with their Consent.

ART. VIII.

This Fact is proved by the Oath of Mr *Foulis*, p. 4. at B.

Proof of
Art. VIII.

As this Marriage, for the Reasons above mentioned, was meant to be kept secret, in as far as the Nature of the Case would permit, the only Persons that were intended to be present at the Celebrating thereof, were, Mr *Cameron* of *Kinnaird*, the Respondent's Father, Mrs *Malcolm*, the Complainer's Mother, Mrs *Cameron* of *Kinnaird*, the Respondent's Stepmother, Miss *Anne Cameron*, and Miss *Sally Cosnan*. And accordingly, how soon Mr *Foulis* arrived at Mrs *Cosnan's* House, where he was carried into a Room by himself, the above-named Persons, and amongst with them the Respondent and Complainer, came all together into the Room where Mr *Foulis* then was; and after the usual Compliments upon that Occasion, Mr *Foulis*, who was a Stranger to most of the Company, addressing himself to Mrs *Malcolm*, who was pointed out to him as the Complainer's Mother, asked her, If the Complainer was her Daughter; and if she agreed to her Marriage with the Respondent? To both which she assented: And having put the like Question to the Respondent's Father *mutatis mutandis*; to which he received the like Answer, he proceeded to celebrate the Marriage, according to the Form of Service prescribed by the Church of *England*, after that the Complainer and Respondent had severally signified their Consent to accept each other for Husband and Wife.

ART. IX.

These Facts are distinctly proved by the concurring Testimonies of Mr *Foulis*, p. 4. at D, E, F, G; Miss *Sally Cosnan*, p. 9. at E, F, G; and p. 10. at F; Miss *Anne Cameron*, p. 8. at A, B, C, and Mrs *Cameron* of *Kinnaird*, p. 20. at A, B, C, D:

Proof of
Art. IX.

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And which is further instructed by the Marriage-lines, duly subscribed by the Parties themselves and the Minister.

ART. X. Though the Complainer's Mother had thus signified her Consent to the Marriage in express Words, it appears, that, in respect of some Fret or other, she did not chuse to remain in the Room during the Time that the Marriage was celebrating; and therefore desired the Minister to proceed: And as the Respondent's Father, without inquiring into the Grounds of this Conceit, thought it improper that he should be present in the Room, since the Complainer's Mother chose to be absent; the two Parents retired of Consent into another Room, until the Marriage should be celebrated; so that by this means the only Persons present at the Marriage, were the others above named, viz. Mrs Cameron of Kinnaird, Miss Anne Cameron, and Miss Sally Cosnan.

Proof of
ART. X. And these Facts are proved by Mr Foulis, p. 5. at A, B; Mrs Cameron of Kinnaird, p. 20. at A; Miss Anne Cameron, p. 8. at A; and Miss Sally Cosnan, p. 10. at A, B, C.

ART. XI. How soon the Marriage-solemnity was over, the Respondent's Father and the Complainer's Mother returned into the Room; and the Complainer's Mother, after paying her Compliments to the Minister for the good Office he had done, and congratulating her Daughter and the Respondent upon the happy Occasion, drank a Glass of Wine to the Company; and was an Eye-witness to the writing of the Marriage-lines.

Proof of
ART. XI. This Article is proved by Mr Foulis, p. 5. at B, C, D; Miss Anne Cameron, p. 8. at E; Miss Sally Cosnan, p. 11. at A, B; and Mrs Cameron of Kinnaird, p. 20. at F, G; and p. 21. at A.

ART. XII. These Facts, if true, are inconsistent with the Supposal, that any Force or Violence should have been used upon this Occasion: And that none such was used, but, on the contrary, that the Complainer went through her Part of the Ceremony briskly and chearfully, and appeared extremely contented, is proved by the concurring Testimonies of all the Persons present, viz. Mr Foulis, p. 5. at E; Miss Anne Cameron, p. 8. at D, E; Miss Sally Cosnan, p. 10. at G; and Mrs Cameron of Kinnaird, p. 20. at D.

And

And the Situation of Mrs *Cosnan's* House, and more particularly of that Room where the Marriage was celebrated, is proved to be such, that if there had been any the least Noise or Disturbance therein, it must have been heard throughout the whole House, by the Servants and all others therein; as appears by the Testimonies of Miss *Jean Cosnan*, p. 15. at E, F, G; Mrs *Cameron* of *Kinnaird*, p. 21. at C, D; Mrs *Cosnan* herself, p. 28. at A; *Elisabeth Ewen*, p. 28. at F, G. And these Witnesses do all further agree, that as there was not the least Appearance of Force or Violence of any Kind, so no Noise or Disturbance was heard. And to this may be added, that as the Windows of Mrs *Cosnan's* House front the Fore-street, it was an easy Matter to have given the Alarm, not only to Mrs *Cosnan* herself, and the rest of her Family, who were ignorant of what was doing in the other Room, but also to the whole Neighbourhood.

ART. XIII.

Proof of
Art. XIII.

Thus far Matters had proceeded with the greatest Harmony; when the Respondent, flushed and heated with the Prospect of completing his Happiness, and forgetting the Compromise, that the Marriage should not be consummated for some time, having proposed to the Complainer, that they should be bedded that same Night, did by her Permission make the Proposal to her Mother; and may possibly have pressed that Matter with more Warmth and Keeness than was proper. And though this was certainly a most venial Offence, which, from the Circumstances of the Case, and the Respondent's Age, might easily have been pardoned, it appears, that the Complainer's Mother fired upon it, run out into a violent Passion, upbraided the Respondent with Breach of Covenant; and expressing herself in Words to this Purpose, That she could expect no Good from a Man who had broke his Promise the very first Night, called for her Chair, insisting to be gone, and to carry the Complainer alongst with her.

ART. XIV.

That this was the only Cause of Offence, is proved by Miss *Sally Cosnan*, p. 11. at E, F, G; and Mrs *Cameron* of *Kinnaird*, p. 22. at B, C.

Proof of
Art. XIV.

The Respondent, sensible of the Error he had committed, and willing

willing to make all possible Atonements therefor, made his Acknowledgments to the Complainer's Mother, in hopes that Matters might hereafter be so managed, as to procure her Consent to the Consummation of the Marriage, before he should set out for foreign Parts: And from her after Behaviour towards the Respondent that same Evening before she left Mrs *Cosnan's* House, and for some Days thereafter, there was Reason to think, that what had passed upon the aforesaid Occasion, was forgotten and forgiven.

ART. XV. For it stands in Proof, that the Respondent and his Father waited upon the Complainer and her Mother down Stairs from Mrs *Cosnan's* House to their Chairs; where the Respondent's Father wished them good Night; and received the like Compliment in return: That the Respondent waited upon the Ladies home to their own House, walking by their Chair-side: That he waited upon them from their Chairs up to their Lodgings; and, after staying some little Time in the House, took his Leave for that Night, to all outward Appearance, in the greatest Amity and Friendship.

Proof of
ART. XV. These Facts are deposed to by *Robert Scot*, p. 26. at F, G; *Elisabeth Ewen*, p. 29. at D, E; *Anne Johnston*, p. 30. at F; and *Allan Farquharson*, p. 31. at D, E, F, G.

ART. XVI. Upon the Morning of the next Day, the Complainer and her Mother, in return to the Civilities they had received in Mrs *Cosnan's* House the Night before, sent Compliments to her and her Family, and particularly to Mr *Cameron* of *Kinnaird* and his Lady, desiring to know how they were.

Proof of
ART. XVI. This Fact is deposed to by Miss *Sally Cosnan*, p. 12. at B; Mrs *Cameron* of *Kinnard*, p. 21. at D; Mrs *Cosnan*, p. 28. at C; *Elisabeth Ewen*, p. 29. at A, B; and *Anne Johnston*, p. 30. at G; this last being the Servant-maid, who herself carried the Message. How inconsistent that is with the Tale of a forcible Marriage, and other Outrages the Night before, is humbly submitted.

ART. XVII. But the Evidence does not stop here: For, it appears, that, for several Days thereafter, the Respondent continued to visit the Complainer

Complainer and her Mother in their own House; that he breakfasted, dined, and drank Tea with them; and received Messages from them, desiring him to come to the House.

These Facts are deposed to by Miss *Sally Cosnan*, p. 12. at B, C; by *Anne Johnston*, the Servant-maid to the Complainer's Mother, who carried these Messages, p. 31. at A, B; and by *George Couper* Writer in *Edinburgh*, a Witness adduced on the Part of the Complainer, who happened to dine one of those Days with the Complainer and Respondent at Mrs *Malcolm's* House.

Proof of
Art. XVII.

These Facts being proved by Witnesses of Character and Credit, who cannot be supposed to have conspired together to perjure themselves, in order to establish this Marriage: And as from thence it appears, that here was a previous Courtship, prompted and countenanced by the Mother of this Complainer; that the Proposals of Marriage under the aforesaid Conditions were highly acceptable to her; and that the Marriage itself was celebrated under her Eye, and with her express Consent; it is impossible, without shutting one's Eyes against the Light of the Sun, to doubt of the Reality of this Marriage, or to entertain the least Suspicion, that it was brought about by Force and Compulsion.

And though the Complainer, from the Words that have been put into her Mouth, by this good Lady, her Mother, would impress your Lordships, to discredit the Depositions of these Witnesses, from their supposed Connection with the Respondent; it does not occur, how your Lordships can deny Credit to a habile Witness; especially where the Facts by them deposed are supported by such a Chain of Circumstances, and by the Depositions of other Witnesses of Character and Credit, liable to no sort of Suspicion.

For as to the Reflection that is insinuated against the Credit of the Reverend Mr *Foulis*, in respect of his having been dismissed from the *English* Chapel, where he had officiated for so many Years; the Occasion of his being so dismissed, is well known to

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many of your Lordships, not for any Immorality or Misbehaviour in the Character of a Minister; but in regard that, from a Want of Fortitude, incident to human Nature, he had deserted his Charge, when the Rebels took Possession of the City of *Edinburgh*; and did not return thereto so soon as it was thought he ought to have done. And as some of the Managers were induced to impute this to a Principle of Disaffection to the established Government, the most distant Appearances of which were not to be tolerated at those Times; it was therefore thought proper to dismiss him from that Office, without any Cause assigned. But as that Gentleman lived and died with the Character of a pious good Man, it would be straining beyond all Bounds, to suspect his Veracity upon this Occasion, or to suppose him capable of prostituting his Office in celebrating this Marriage, if there had been the least Appearance of Compulsion, or without the Consent of the Complainer herself and her Mother. But as the Proof of these Facts does not depend upon the single Testimony of that Gentleman, but is ascribed by the other Proofs, and by such a Chain of Circumstances, both previous and subsequent to the Marriage; the Respondent, without further Argument, submits it to your Lordships, that there is not only a legal Proof, but convincing and irresistible Evidence, of the Truth and Reality of all and each of the Facts above stated.

The History that is given of this Adventure by the Complainer herself, in her judicial Declaration, and as thereafter deposed to by the Mother, is so manifestly absurd and ridiculous, that, was there nothing to be set in the opposite Scale, it could not possibly be credited. And not to trouble your Lordships with unnecessary Remarks upon the many Inconsistencies and Incredibilities in the Account of this Matter as related by them, the Respondent will submit to your Lordships the following Considerations. *1st*, How incredible it is, that the Respondent could have imagined to accomplish a Marriage of this kind by Force and Compulsion, in this City, when not only the Family, but the whole Town, might have been so easily alarmed. *2^{dy}*, How much

much more incredible it is, if any thing of this kind had been intended, that the Respondent should have been no otherwise prepared than he appears to have been, to carry this intended Violence into Execution. *3dly*, It surpasses all human Comprehension, that the Complainer's Mother, a Lady of such strong Passions, and upon other Occasions abundantly vociferous, should have bore this Outrage and Insult with so much Tranquillity and Composure, as she must needs have done without the least Disturbance, or attempt to give any Alarm, either to the rest of the Family, or to the Neighbourhood; that she should have sat peaceably all the Time the Respondent was absent in quest of a Minister, though previously apprised that he was gone upon that Errand; and when, according to the Tale by her told, the Respondent, before he set out in quest of the Minister, delivered the Complainer to the Custody and Keeping of the Respondent's Father, and Miss *Sally Cofnan*: And yet, during all this Time, and till the Respondent returned with the Minister, it is not alledged, that she either attempted to rescue her Daughter from this Captivity, or to get out of the House, or to give any Alarm, either to the Family or Neighbourhood, but sat with her Arms across, seeing her Daughter in Captivity, a Sacrifice prepared for a forcible Marriage, waiting the Respondent's Return with the Minister; when the other Scenes of Violence, *first*, in the Marriage itself, *2dly*, in the Attempt to ravish the Complainer, are said to have been committed. How these Outrages can be reconciled with the Complainer and her Mother's after-Conduct, surpasses all Comprehension. An Injury of this kind would have been the highest Insult and Provocation that can be imagined, and would have justified every Act of Resentment and Revenge. Instead of which, no sooner is the Complainer's Mother seemingly pacified for the Offence that had been committed by the proposed Bedding, than she appears behaving with common Civility to the Respondent and his Father, allowing them to convoy her Daughter and her to their Chairs, paying them the usual Compliments of a Good Night, permitting the Respondent to wait upon

upon her home to her own House, where they parted for that Night seemingly in good Terms; sending Compliments next Morning by her own Maid, in her own and her Daughter's Name, to Mrs *Coshan* and her Family, and to the Respondent's Father and Step-mother; and, for several Days thereafter, not only admitting the Respondent to visit in the Family, and to breakfast and dine with her and her Daughter, but sending Messages in quest of him. If these Things can be reconciled with the Supposal of such flagrant Abuses acted and committed so recently before in Mrs *Coshan's* House, the other Particulars related by this Complainer, and confirmed by her Mother, may be equally true. But the Respondent submits it to your Lordships, that this Tale appears to be an absolute Fiction, false and incredible in every Article, hatched and contrived from a most groundless Resentment conceived by the Complainer's Mother, upon a most trivial Ground, and for a most venial Offence.

By what Influence she was prevailed upon, after an Interval of so many Days, to attempt the annulling of this Marriage, probably upon a mistaken Apprehension, that as the Marriage had not been consummated, it might be dissolved, is to the Respondent unknown. But in Fact it appears, that no sooner than about the 8th Day of *January* 1755, which was twenty Days after this Outrage is supposed to have been committed, this good Lady, the Complainer's Mother, exhibited in her own Name a criminal Information to the High Court of Justiciary, against the Respondent and his Father, as guilty of a forcible Marriage, praying for a Warrant of Commitment. And as this Information was aggravated with many horrid Circumstances, false in every Article, she so far prevailed, that a Precognition was taken, by examining most of the Witnesses present upon that Occasion, whose Depositions are above referred to. But as they concurred in giving the same Account of these Facts as they have since deposed, disproving the Information in every Article, the Warrant of Commitment was justly refused; and the Complainer, or rather her Mother, was left to prosecute her Declarator of Freedom before the proper

proper Court. A Process for that Purpose was accordingly brought: And as the Respondent was thereby obliged, in Self-defence, to bring a counter Process of Adherence, and for declaring the Marriage, the two Processes were conjoined; and an Act before Answer pronounced in common Form, whereby both Parties were allowed to prove their several Allegations, and all other Facts and Circumstances that they might judge material.

The Proof adduced on the Part of the Respondent is such as has been above stated; and the several Facts by him alledged are thereby distinctly proved by the concurring Testimonies of Witnesses of Character and Credit, many of them no wise connected with the Respondent, and therefore not liable even to the smallest Suspicion of any undue Bias: And if their Evidence is to determine this Issue, it is humbly thought, that a clearer Case cannot possibly occur.

The Witnesses adduced upon the Part of the Complainer are, in the first place, her own Mother, justly objected to, and therefore received *cum nota*, not only in respect of the Degree of Relation in which she stands to the Complainer, and of the Part she acted in exhibiting the aforesaid criminal Information, but also in regard of the Notoriety, that she was the Prompter, Adviser, and Carrier-on of this Process: And the Respondent will be pardoned to think the Objections were such, that she ought not to have been received even *cum nota*. But, abstracting from that Consideration, as she is the single Witness adduced for the Complainer who had Access to know the Transactions in the House of Mrs *Cosnan*, when her Evidence is set in opposition to the other Proofs above stated, the Respondent submits it to your Lordships, what Credit can be given to her Testimony.

The Complainer's Sister *Emilia* was likewise admitted *cum nota*. But as the intended Marriage, which, for the Reasons above mentioned, was meant to be kept secret, was not thought proper to be made known to her, in respect of her own unhappy State and Condition, which was but too visible in her Appearance and Behaviour when produced as a Witness in Court; and

as, by means thereof, she could give no direct Testimony touching the material Facts, and may well be presumed to be but too much under the Influence of her Mother, the Respondent forbears to make any Reflections upon the several *minutiae* by her deposed.

The only other Witness of any Consequence adduced for the Complainer, is *Mally Hay*, the Complainer's Mother's Servant-maid, and who is here dignified with the Character of the young Lady's Governess, though in reality she never was in any other Station than that of a Servant-maid. And though the Particulars meant to be proved by her single Testimony, are not directly in Point touching any of the material Facts, but are principally intended to justify an injurious Reflection which has been thrown out against the Respondent's Father, as if he should have attempted to corrupt the said *Mally Hay* to give a false Evidence; the Respondent will be permitted to make a few Observations touching the Credibility of this Witness, from some of the Particulars to which she deposes, and in which she stands single, contradicted by other Witnesses, of at least equal Credit.

And more particularly, your Lordships will observe, that in order to induce a Belief of the Complainer and her Mother's having been decoyed into the House of Mrs *Cosnan*, with an Intention to detain her there, during the Residue of that Evening, where the Marriage was to be accomplished by the supposed Force and Compulsion; it has been alledged, and attempted to be proven, on the Part of the Complainer, That a fictitious Message was sent that Evening to Mrs *Malcolm's* Lodgings, to acquaint the Servants, that she was not to be home that Night. And as this Message is presumed to have proceeded from the Respondent, without the Knowledge or Consent of the Complainer's Mother, the Witnesses adduced for Proof of this particular Fact, are the aforesaid *Mally Hay*, and *Anne Johnston*, the other Servant-maid. And though it was *Anne Johnston* who received the Message at the Door, and who deposes, in express Words, that the Message she received was to let her know, *that her Mistress was to be home*
that

that Night, and which might reasonably have been doubted, in regard it is proven to have been between Three and Four in the Morning before that the Company broke up at Mrs *Cosnan's* House; yet this other Witness, *Mally Hay*, who knew nothing of the Particulars of this Message, further than as it was reported to her by *Anne Johnston*, the other Servant, has presumed to depone, "That *Anne Johnston* told her, the Message was, that "Mrs *Malcolm* was come to Town, but was not to be home that "Night." Which of these two is to be credited, your Lordships will judge. It is hardly to be thought, that *Anne Johnston* could report the Message which she had then received, in terms so diametrically opposite to what she has deposed the Message truly was. And the most favourable Construction that can be put upon the Oath of this Witness is, that she has mistaken the Message as related by the other Servant. And there is real Evidence from what followed, that the Message must have been such as deposed to by *Anne Johnston*: For that though they lay down upon the Bed, in regard their Mistress staid out so late, they did not throw off their Cloaths, that they might be ready at a Call to open the Door when she should come home: Whereas, had the Message imported, or had they believed, that she was not to be home that Night, it is reasonable to think, they would have gone to their naked Beds. But whatever the Message was, there is no Evidence that it was sent by the Respondent; and he positively denies, that he either sent it, or knew of its being sent. And was it in any Degree material, what the Terms of this Message were, it could never be established by the Oath of this single Witness, swearing at second hand, in opposition to the positive Evidence of the other Servant, who received the Message.

But the material Circumstance endeavoured to be proved by the Oath of this *Mally Hay*, is, That the Respondent's Father having sent to her under a borrowed Name, and thereby procured a Meeting with her, should have endeavoured to corrupt her to give a false Evidence, promising her *L. 100 Sterling*, if she would swear

swear to the previous Courtship and Concert of Marriage between the Complainer and the Respondent.

What Truth may be in this Fact, the Respondent has no Access to know, further than by Information from his Father. The Character his Father bears, makes it highly improbable, that he could be guilty of what is here laid to his Charge. An Attempt of this kind must have been foolish beyond Measure, where there was such complete Evidence of the Fact by such a Cloud of other Witnesses, of unsuspected Credit and Veracity. And as, throughout the whole of this Witness's Deposition, there appears a remarkable Partiality in every Particular, the Respondent will be pardoned to insist, that no Credit can be given to her single Testimony in the above Particular. So far the Respondent has been informed by his Father, that from an Anxiety to know what the real Motives were of those extraordinary Proceedings on the Part of the Complainer's Mother, and what she proposed by denying the Reality of this Marriage, of which she believed this Witness could give him the surest Intelligence, and being jealous that she would not chuse to meet with him, he sent her a Message in a borrowed Name; and upon meeting with her, endeavoured to extract from her what Information she could give in the above Particulars. But that he either promised her a Bribe of any kind, or used any Solicitations to persuade her to give a false Evidence, is denied. And as the Truth or Falsity of these Allegations stands upon the Threap between her and the Respondent's Father, though, it is believed, few to whom they are known, would hesitate which to believe; it is sufficient for the Respondent's Purpose, that the single Testimony of this Witness is no Proof.

And in weighing the Credibility of this Witness, it is an unlucky Circumstance, that the Courtship and Intimacy between the Respondent and the Complainer, so conspicuous to every other Person, should have escaped the Observation of this *Abigail*; for she depones she never observed any Fondness betwixt the Pursuer and Defender; though *Robert Mein Wright*, p. 32. at E, swears,

swears, that upon his asking *Mally Hay* what brought the Respondent so often to *Lathrisk*? she told him, that she believed he was in courtship with *Miss Jamie Malcolm*.

And there is one remarkable Circumstance, which cannot be overlooked, as it discovers a most unbecoming Partiality and Bias, to give it no harder Name. She has presumed to depone, That when the Respondent came to her Mistress's House, upon the aforesaid Occasion, when he was seeing the Complainer and her Mother home, after the Marriage, *he appeared to be drunk, and could hardly stand*. Whereas *Anne Johnston*, the other Servant-maid, p. 30 at E. depones, "That she lighted the Pursuer down Stairs, (being four Stories high), and did not observe, that he "was any wise touched with Liquor." And this is confirmed by the Oath of *Allan Farquharson* the Chairman, p. 31. at F; who gives account of the Respondent's having gone alongst with the Complainer and her Mother, by their Chair-sides, when carried home that Night; that he lighted them and the Respondent up Stairs, and does not think the Respondent was in the least the worse of Drink. Both the Servant-maids agree, that the Respondent took his Leave, and wished the Ladies Good Night, after being but a few Minutes in the House. And in this short Space of Time, this discerning *Abigail*, who does not pretend to have exchanged Words with the Respondent, was so sharp-sighted, as to see, that he appeared so drunk, that he could hardly stand; though to the Chairman, with whom he came up the Street, and who lighted him up Stairs, and to the other Servant-maid, who lighted him down Stairs, he appeared quite sober. And such being the general Complexion of the Testimony emitted by this favourite Witness, the Respondent submits it, without further Argument, what Degree of Credit is due to her Evidence in this Particular, when so evidently partial, and contradicted, in other Particulars, by the concurring Testimonies of other Witnesses, of at least equal Credit.

The Respondent will conclude what he has to offer upon this first Point, by submitting to your Lordships, how improbable, or

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rather how incredible it is, as is averred in this Bill of Advocation, that this intended Marriage should have been altogether unknown to the Complainer herself, till that Instant of Time when it was to be solemnized. Every Circumstance of the Case shews, that this could not possibly be true. And if it could be supposed, that the Respondent had been capable of so brutal an Action, how will it be believed, that the Complainer's Mother, who admits the Proposals of Marriage made to her, should not only have concealed this from her Daughter, when she communicated it to her Sister, and Brother-in-law; but that she should have consented to, or witnessed a Marriage, into which her Daughter was to be thus precipitately hurried? There are a thousand other Facts deposed to by the Witnesses, which have not been particularly taken notice of, that discredit this Allegation. And the Letter referred to, as wrote by the Respondent to the Complainer's Mother, and delivered in secret by *Robert Scot*, can by no Construction be so wrested, as to import an Injunction, that the intended Marriage should be kept a Secret from the Complainer. All that the Respondent had thereby in view, or that can fairly be inferred from the Words of the Letter, was, that what had passed between the Respondent and the Complainer's Mother, meaning the Concert of Marriage, should not be made known to those Ladies who were to be of the Party with the Complainer's Mother, in the Journey to *Edinburgh*, meaning his Stepmother, Miss *Anne Cameron*, and Miss *Cosnan*; as hitherto the Respondent had not discovered to them his Proposals of Marriage, and did not chuse the same should be known, till he should converse his Father upon the Subject. So that it is plainly straining beyond all Bounds, to make the Word *Ladies* apply to the Complainer; and from thence to presume, that the intended Marriage was kept a Secret from her.

This preliminary Point being established, that there was here an actual Marriage previously concerted, and agreed upon; and the alledged Force or Compulsion, by which it is said to have been accomplished, being so clearly disproved; the Respondent proposes

proposes to trouble your Lordships with very few Words, in answer to the several Defences; which, being formerly pleaded, and over-ruled by the Commissaries, are resumed in this Bill, and seem to resolve into the following Particulars. 1st, That supposing a Marriage *de facto*, it is void and ineffectual, as brought about by Deceit. 2^{dly}, As null in respect of the Complainer's Age, she being but a few Months past the Age of twelve when this Marriage is said to have been celebrated. 3^{dly}, That the Marriage not being consummated, she is at Liberty to refile.

With respect to the *first* of these, the Respondent will fairly confess, that he does not understand what is thereby intended. The Complainer must, in this Part of the Argument, be supposed to be of such an Age as to be marriageable. It must also be supposed, that there was here no Force or Compulsion. And, upon these Suppositions, the Respondent will be allowed greatly to doubt, whether Fraud, however relevantly qualified and proved, would be available to dissolve a Marriage actually celebrated between Parties capable of Marriage. Marriage is a Contract of divine Institution; and as such, binding both by the Moral and Divine Law. Our Saviour's Precept is general, That whom God hath joined, no Man shall put asunder. This Maxim is received into the System of the Laws of every Christian Country. And its being brought about by Deceit, are but Words without any sort of Meaning, when not supported by Proof of positive Facts. And the Respondent appeals to the whole Proof adduced in this Case, that no Arts or Machinations appear to have been used to procure either the Complainer's own Consent, or that of her Mother; in granting of which they were fully as forward, as the Complainer in asking it.

It is known to your Lordships, that, by the Roman Law, though a Minor might be restored against the *sponsalia de futuro*, Restitution was denied *contra matrimonium jam contractum*. *Deneganda insuper ex capite minorennitatis restitutio adversus matrimonium; quippe omnis vitæ consortium continet, et individuum ex conjugum voto conjunctionem; adeoque favorabilius est quam ut ætatis*

ætatis obtentu resolveretur, are the Words of *Voet, tit. de minor. parag. 45.* Enorm Lesion was supposed in the Restitution *ex capite minorennitatis*; and therefore the Reason assigned by the learned Author, why Restitution was not allowed of in the Case of Marriage, applies with equal Force to the Case in hand, *esto* it were proved, as it is not, that the Complainer or her Mother had, by Fraud and Deceit, been drawn into this Marriage. And if this Doctrine were to be established, it is impossible to say what the Consequence might be. Marriages would be thereby reduced to a very precarious and uncertain Footing; Proofs of a pretended Deceit might be easily patched up, where Parties were disposed to have a Marriage dissolved. Neither would it be any Bar to a Challenge of this kind, that the Marriage had been consummated. This might render the Injury more atrocious to the Party deceived, but could furnish no Defence to the Party deceiving. Nor would it make any Difference, whether the Parties were Majors or Minors; as in all Cases where *dolus dedit causam contractui*, the Major, as well as the Minor, were equally intitled to Restitution.

And, in answer to the *second* Defence, the Respondent admits, that the Age of Consent must be regulated by the Municipal Laws of every Nation. Marriage is a consensual Contract; and it depends upon the Law to fix the Period when Parties shall be presumed capable to consent. The Law of *Scotland* has, by immemorial Usage, fixed the Period at which Parties shall be deemed capable of Marriage, to be in Males at the Age of fourteen, and in Females at the Age of twelve; and this founded upon a *presumptio juris et de jure*, which can admit of no contrary Proof of their supposed Abilities at the Age, not only to consent, but even to consummate the Marriage. So the Rule is established by *Lord Stair, p. 26. parag. 6.*; *Sir George Mackenzie, Title Marriage, p. 3.*; and in the late *Institute, b. 1. tit. 5. parag. 26.*

This Age of fourteen in Males, and twelve in Females, was the Rule established by the *Roman* Law. Such also is the received Rule in our neighbouring Country, as appears from every single

single Author who has wrote upon that Subject, particularly *Bacon*, in his New Abridgment, *vol. 3. p. 119.* His Words are, "The Age of Consent to a Marriage in an Infant Male is fourteen, and in a Female twelve." And Marriage was so much the Favourite of both these Laws, that supposing the same to have been *de facto* celebrated at an earlier Period, and before that an effectual Consent could be adhibited, if Parties continued in that Disposition of Mind till they attained the Age established by Law, and did not then declare off, the Marriage was fixed, and could not thereafter be rescinded.

In hotter Climates, where they sooner attain to Maturity, Marriage is allowed of at an earlier Age. These must be regulated by the Municipal Laws of the different Countries, which are calculated to answer *id quod plerumque fit.* Instances frequently happen, that some are earlier, others later in attaining to that Maturity of Body and Stability of Judgment which ought to be the Basis of Marriage. But as these Things could not be left variable and uncertain, it was expedient that a general Rule should be fixed. Twelve in Females, and fourteen in Males, is the Standard in the Laws of this Country, as it was by the *Roman Law.* In hotter Countries, Women are marriageable at eight, nine, or ten: And we read in *Prideaux's Life of Mahomet*, that he married *Cadhyzia* at her Age of five, and consummated the Marriage at her Age of eight: And Baron *Montesquieu* observes, that, in the hotter Parts of *Arabia*, and in the *Indies*, eight is considered to be the marriageable Age; and that they frequently bear Children in the ninth Year.

All that is offered on the Part of the Complainer, in opposition to this Principle of the Law of *Scotland*, proved and established by the above Authorities, is a Quotation from *Skene*, which the Complainer would suppose to import an Opinion of that learned Author, that, by the Laws of this Country, a Female was incapable of Marriage before she attained the Age of fourteen Years complete, and that Males were not allowed to marry before their Age of twenty-one complete.

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But the Respondent submits it to your Lordships, without any Argument, that the Quotation from *Skene* is either misunderstood or misapplied. He is there treating of the Marriage of the Vassal, as an acknowledged Casualty of Superiority in Cases of Ward-holding: And though that Holding, with all the Casualties dependent thereon, is now happily abolished, it is known to your Lordships, that as the Superior was intitled to the single Avail of that Casualty, so upon the Vassal's attaining to the Age proper for Marriage, it was allowable for the Superior to offer him a Wife, with whom he might receive a reasonable Portion, that being the Measure of the Superior's Casualty; and in case he refused, without any reasonable Cause assigned, he became liable to the double Avail *per modum pene*; and as this was a Perquisite of the Superior's, it could not be defeated by any premature Marriage of the Vassal. And therefore it was, that in order to regulate these Questions between the Superior and Vassal, and to fix the proper Limits when a presumptive Heir might marry in the Lifetime of his Predecessor, without any presumed Intention to defraud his Superior of the Casualty of Marriage, or that it should be allowable for the Superior to require the Vassal to marry; this was fixed at the Age of fourteen complete in Females, and of twenty-one in Males: Nor was any Thing further intended by *Skene* in the Passage referred to. And upon the same Authority, the Complainer might with equal Reason contend, that the Marriage of a Male before the Age of twenty-one complete, is null for want of Capacity to consent. This would rather be too absurd; and yet the Authority referred to must prove the one, if it proves the other.

The *last* Defence is founded upon the Assumption of a strange Principle, That to validate a Marriage, there must be an actual Consummation. The Respondent admits, that a Capacity to consummate is requisite; and this the Law fixes, *presumptione juris*, to be at the Age of fourteen complete in Males, and of twelve in Females. But hitherto the Respondent has understood the Rule of Law to be, *Quod consensus, non coitus, facit matrimonium*.

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To confirm this by Authorities, either from the *Roman Law*, or from the Laws of other Nations, or from the Municipal Laws of this Country, would be paying too great a Compliment to a Defence that has not a Foot to stand upon. Was this to be established, there behoved to be a Jury of Matrons to inspect and judge of the Maturity of all such as after Marriage should refuse to consummate, and, upon that Pretence, should pretend to dissolve the Marriage once fairly contracted. In some Cases, it might be Matter of no easy Proof, whether the Marriage had been actually consummated or not; so that it would be the most imprudent Regulation in any Society, to make the Validity of a Marriage once fairly solemnized between Persons capable to consent, dissolvable upon an Alledgeance, which in this Case is admitted to be true, that there was no actual Consummation.

The Respondent has fairly admitted, that after conversing with the Complainer, and finding her no ways reluctant, that the Marriage should be so far at least consummated, as to have an actual Bedding, he proposed the same to the old Lady, and possibly may have pressed it with more Warmth than Discretion. But that any Attempts were used to commit a legal Rape, or forcibly to bed the Complainer, is the grossest Calumny and Fiction that ever was invented, unsupported by any credible Evidence, and clearly disproved.

In respect whereof, it is hoped, your Lordships will have no Difficulty in affirming the Sentence of the Commissaries, and refusing this Bill of Advocacion.

ALEX. LOCKHART.

E. J. J. J.
6/2/11